

The Assistant Director found claimant was an employee of the respondent on the date of her accident of October 30, 1991. Therefore, the Assistant Director found that the respondent and claimant were subject to the Kansas Workers Compensation Act.

However, respondent contends that the record proved claimant was not an employee of the respondent but was an independent contractor of the respondent. Accordingly, the respondent argues that the provisions of the Kansas Workers Compensation Act do not apply to the claimant and the respondent.

After finding the respondent and the claimant were subject to the provisions of the Workers Compensation Act, the Assistant Director went on to find claimant had failed to timely serve a written claim for compensation upon the respondent as required by K.S.A. 44-520a (Ensley). Accordingly, the Assistant Director dismissed claimant's claim for workers compensation benefits.

The claimant contends a timely written claim for compensation was served on the respondent. Claimant argues respondent furnished medical treatment for claimant's work-related injuries and the respondent failed to notify the claimant of the termination of the medical treatment. Claimant argues, although claimant filed the written claim almost two years after the date of accident, the claim was timely.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

(1) The Appeals Board finds the conclusion of the Assistant Director that claimant was an employee of the respondent and not an independent contractor and, therefore, subject to the provisions of the Kansas Workers Compensation Act should be affirmed.

The Appeals Board finds the record established that the respondent had the authority to exercise control over the manner claimant performed her over-the-road truck driver job. Thus, the Appeals Board finds that the record, as a whole, established an employer and employee relationship subject to the provisions of the Kansas Workers Compensation Act. The Appeals Board also finds that the Assistant Director's findings of fact and conclusions of law in regard to this issue are accurate and supported by the record. The Appeals Board finds there is no need to repeat those findings and conclusions in this Order and adopts them as its own.

(2) The facts are not in dispute in regard to whether a timely written claim for compensation was served by the claimant on the respondent as required by K.S.A. 44-520a (Ensley).

Claimant was injured while working for the respondent on October 30, 1991. Respondent had knowledge of the injury and claimant received both medical treatment and disability income payments from an Occupational Accident Insurance policy through C.N.A. Insurance Company. The policy was not furnished by the respondent but was purchased and paid for by the claimant.

Claimant testified she was first treated for her work-related injuries by Dr. John Romito of Butler, Missouri. Dr. Romito saw claimant some ten times before he referred her to orthopedic surgeon Dr. Lanny Harris in Kansas City, Kansas.

Claimant testified she saw Dr. Harris only on one occasion and he diagnosed her with a rotator cuff tear of the right shoulder. There is no evidence in the record, however, to establish on what date claimant was treated by Dr. Harris and on what date the respondent or its insurance carrier paid for the treatment.

Claimant filed an Application for Hearing with the Director of Workers Compensation on August 18, 1993. The parties agree that this was the first written claim for workers compensation benefits served by the claimant on the respondent. Furthermore, the respondent had knowledge of claimant's accident and failed to file an accident report with the Director. Thus, claimant had one year to serve a written claim on the respondent. See K.S.A. 44-557(a) and (c) (Ensley). Time to serve a written claim commences on the date of accident or the date of last payment of compensation. See Odell v. Unified School District, 206 Kan. 752, Syl. ¶ 3, 481 P.2d 974 (1971).

Following a pre-hearing settlement conference, the Administrative Law Judge appointed Roger W. Hood, M.D., to evaluate claimant's injuries. Dr. Hood first saw claimant on June 20, 1994. At Dr. Hood's recommendation, claimant was placed in an aggressive rehabilitation exercise program for both her back and right shoulder injuries.

The Assistant Director concluded that claimant failed to file a timely written claim for workers compensation benefits on the respondent as required by K.S.A. 44-520a (Ensley). The Appeals Board agrees with this conclusion. First, there is no evidence in the record as to whether Dr. Harris was authorized by the respondent to treat claimant's injuries, the date Dr. Harris treated claimant, or the date Dr. Harris' statement for services for treatment was paid by the respondent. Because the record fails to establish a date compensation was last paid, the date of accident must be used to determine whether written claim was timely served. Therefore, the claimant had one year from the October 30, 1991, date of accident to serve a written claim on respondent. See K.S.A. 44-557(c) (Ensley). As previously noted, the first written claim the claimant filed for workers compensation benefits was her Application for Hearing which was filed with the Director on August 18, 1993. The written claim was not timely because this period exceeds one year.

The claimant also argues the medical treatment ordered in 1994 by Administrative Law Judge Alvin E. Witwer revives claimant's right to file a written claim for compensation.

However, whenever a period in excess of the statutory time for filing a written claim elapses, i.e., as in this case, one year from date of accident, and no compensation is paid or medical treatment furnished, the claimant's right to file a written claim is not revived by subsequent payment of such compensation or furnishing of medical treatment. See Rutledge v. Sandlin, 181 Kan. 369, Syl. ¶ 2, 310 P.2d 950 (1957). Accordingly, this medical treatment did not revive claimant's right to file a written claim because the time had elapsed before the medical treatment was furnished.

The Appeals Board also finds the Assistant Director's findings of fact and conclusions of law on this issue are accurate. There is no reason to repeat those findings and conclusions in this Order and the Appeals Board adopts them as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the February 2, 1998, Award entered by Assistant Director Brad E. Avery should be, and is hereby, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of September 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Larry D. Nuss, Fort Scott, KS
Thomas V. Clinkenbeard, Kansas City, MO
Derek R. Chappell, Ottawa, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director